IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
FIRSTENERGY SOLUTIONS CORP., *et al.*,	)	Case No. 18-50757 (AMK) (Jointly Administered)
	)	
	)	Hon. Judge Alan M. Koschik

OBJECTION BY UTILITY WORKERS UNION OF AMERICA, LOCAL 270, AFL-CIO, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 29, 245, AND 1413, AFL-CIO, TO DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO CONTINUE AND MAKE PAYMENTS DUE AND OWING UNDER THE DEBTORS' RETENTION PLANS (DKT. NO. 400)

Creditors Utility Workers Union of America, Local 270, AFL-CIO, and International Brotherhood of Electrical Workers Locals 29, 245, and 1413, AFL-CIO ("Unions") submit this objection (the "Objection") to *Debtors' Motion for Entry of an Order Authorizing the Debtors to Continue and Make Payments Due and Owing Under the Debtors' Retention Plans* (Dkt. No. 400) ("the Motion").

INTRODUCTION

On April 23, 2018, the Debtors filed the Motion seeking authorization to make payments pursuant to retention plans described therein as the Management Retention Agreements, 2016 KERPs, the Local 29 Retention Plan, the Local 245 Retention Plan, and the 2018 FENOC KERP. On May 14, 2018, at the hearing on the Motion, the Debtors agreed to continue the Motion as to the 2018 FENOC KERP (hereinafter "the KERP" or "the Plan") until June 15, 2018. The Court, by order dated May 14, 2018, authorized the Debtor to make payments pursuant to the Management Retention Agreements, 2016 KERPs, the Local 29 Retention Plan, and the Local 245 Retention Plan. (Dkt. 542).

The retention plans approved by the Court on May 14, 2018, according to the Debtors' own filings, covered 366 employees and totaled $23.9 million. (Dkt. 404-2 at 7, Cumberland Declaration).[1] The 2018 FENOC KERP, for which the Debtors now seek approval, covers 1,019 non-bargaining unit employees at a cost of $99.7 million. (Id.).

Debtors claim that the 2018 FENOC KERP is necessary because the Debtors have determined that the existing 2016 FENOC KERP is not adequate to retain employees through the anticipated plant shutdown dates. (Dkt. 400, ¶25). The Debtors purportedly determined that the 2016 KERP "does not include many Employees who would now be likely to constitute flight risks and seek job security in light of the contemplated deactivation announcement." (Id.).

Although not all non-bargaining unit members are covered by the 2018 FENOC KERP, bargaining unit membership is the principal criteria for distinguishing between those employees covered by the Plan and those who are not. The Debtors' summary of the Plan provides that "[n]o bargaining unit employees are currently in the program," and that the participants are "[a]ll active, non-bargaining FENOC employees," with the exception of those job positions Debtors plan to downsize, those Debtors claim can be readily replaced, and those Debtors deem non-critical. (Dkt. 404-2 at 10).[2]

The 2018 FENOC KERP is described as including reactor operators, senior reactor operators, fleet and site management, and superintendents and supervisors, some of the same categories of employees covered by the Local 29 Retention Plan and Local 245 Retention Plan. (Id. ¶29). The KERP provides participants with 60, 80 or 100 percent of their base salary. (Id.

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[1] Brian L. Cumberland is National Managing Director of Compensation & Benefits Practice at Alvarez & Marsal North America, LLC, retained by the Debtors to assist in evaluating retention plans.

[2] The Unions understand that certain modifications to the original plan were negotiated between the Debtors and the Unsecured Creditors Committee. Because these proposed modifications fail to cover any bargaining unit employees, the Unions' objection is unaffected by these proposed modifications.

¶30). Even though the 2018 FENOC KERP is bigger and broader, in terms of scope and cost, than all of the previously approved retention plans combined, the 2018 FENOC KERP does not include any employees represented by the Unions, even those categories of represented employees covered by the retention plans approved by the Court on May 14, 2018.

The 2018 FENOC KERP covers 1,019 non-bargaining unit employees (Dkt. 404-2 at 7), or 44 percent of FENOC's total employees, (id. at 14). While Debtors' Motion does not specifically state the number of FENOC's bargaining unit and non-bargaining unit employees, based on Debtors' representation that 71% of non-bargaining unit employees are covered by the Plan (id. at 14), FENOC has approximately 1,434 non-bargaining unit employees and 899 bargaining unit employees.[3] Accordingly, under the Plan, 1,019 of 1,434 non-bargaining unit employees will receive bonuses of up to 100% of salary, and none of the 899 bargaining unit employees will receive any payment. Although the money is not allocated equally among those covered, the rough math suggests that about a thousand non-bargaining unit employees will get $100,000 each and bargaining unit employees will get nothing.

It is undisputed that Debtors did not consult Union representatives in the design of the 2018 FENOC KERP, and, in their Motion, Debtors provide no explanation regarding why the Unions were not consulted and why employees represented by the Unions were not included in the 2018 FENOC KERP. The Debtors included almost every other possible interested party, except the Unions. Debtors consulted Alvarez and Marsal Holdings, LLC, FENOC senior management, Hogan Lovells US LLP, Akin Gump, FESC human resources group, FENOC Board, and the Ad Hoc Noteholder Group. (Dkt. 404 ¶¶17-19, Cumberland Declaration).

While the Debtors have not offered any retention payments to bargaining unit employees, the Debtors have used other measures to attempt to retain bargaining unit employees who seek to

[3] FENOC had 2,333 employees as of March 15, 2018. (Dkt. 400, ¶13).

move to jobs outside the nuclear plants. For example, at the Perry plant, the UWUA Local 270 CBA covers FirstEnergy locations other than the Perry plant itself. The CBA provides in Article VI that when jobs outside the Perry plant are posted, employees who work at the Perry plant can apply for such jobs, which are awarded based on seniority and qualifications. Ironically, unlike the non-bargaining unit employees who have no contractual right to transfer to other more secure FirstEnergy jobs and are being offered incentives to stay in their positions, bargaining unit employees actually have a contractual right to leave Perry for other more secure FirstEnergy jobs. Four bargaining unit employees employed at the Perry plant recently applied for three positions as underground electricians, jobs outside the plant that would not be affected by the plant closure. Although the employees are entitled to the jobs by virtue of their seniority and the CBA, one of these employees was advised by a FENOC supervisor, in clear violation of the CBA, that he will not be allowed to move to the underground electrician job to which he is entitled. Rather than incentivizing those employees to stay in their positions when they have the contractual right to transfer elsewhere, the Debtors' actions invite discord. Witness testimony will be presented regarding these matters at the hearing on the Motion.[4]

ARGUMENT

Debtors seek authorization for the Plan pursuant to sections 363(b) and 503(c)(3) of the Bankruptcy Code on the ground that the 2018 FENOC KERP is a sound exercise of the Debtors' business judgment. 11 U.S.C. §363(b)(1) permits a court to authorize such an action only "when a sound business purpose dictates such action." *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). The law "requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such

[4] It is unclear whether the supervisor is one who will receive retention payments under the 2018 FENOC KERP. Relevant pages of the Local 270 CBA are attached hereto as Exhibit A.

an application." *In re Lionel Corp*., 722 F.2d 1063, 1071 (2d Cir. 1983). "[T]here must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b)." *Id*. at 1070.

However, because the KERP "is not an ordinary course transaction," it must also be analyzed under Section 503(c)(3). *In re Borders Grp., Inc*., 453 B.R. 459, 473 (Bankr. S.D.N.Y. 2011). "Section 503(c)(3) limits payments made to the Debtors' employees outside of the ordinary course unless such payments are justified by 'the facts and circumstances of the case.'" *Id*.[5]

Courts have applied different standards to motions pursuant to Section 503(c)(3). "Section 503(c) was added to the Code in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ('BAPCPA')." *In re Pilgrim's Pride Corp*., 401 B.R. 229, 234 (Bankr. N.D. Tex. 2009) (citing *In re CEP Holdings, LLC*).[6]

> [T]he test of section 503(c)(3) should not be equated to the business judgment rule as applied under section 363(b)(1). First, to do so would mean that section 503(c)(3) is redundant. A transfer made or an obligation incurred outside the ordinary course of a debtor's business would fall within section 363(b)(1) in the absence of section 503(c)(3), and, thus, the latter provision would add nothing to the Code. Congress is presumed to intend that independent sections of the Code will have independent, differing impacts. To read section 503(c)(3) as requiring nothing not already required by section 363(b)(1) would violate this principle of construction.
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> Second, the conditioning of approval of covered transfers and obligations upon their being "justified by the facts and circumstances of the case" suggests to the

[5] 11 U.S.C. §503(c)(3) provides that "there shall neither be allowed, nor paid other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition."

[6] In *In re CEP Holdings, LLC*, No. 06-51848, 2006 WL 3422665, at *3 (Bankr. N.D. Ohio Nov. 28, 2006), the court held that the court should consider the role of the recipients in negotiation of the payment plan, and "the base salary compensation of the employee and the additional responsibilities that the employee is required to undertake in order to receive the additional compensation."

> court that Congress intended the court to play a more critical role in assessing transactions, at least those with insiders, that fall within the ambit of section 503(c)(3). In applying the simple business judgment test, courts are adjured to defer to the debtor in possession or trustee; if a valid business reason is shown for a transaction, the transaction is to be presumed appropriate.
>
> The court concludes that section 503(c)(3) is intended to give the judge a greater role: even if a good business reason can be articulated for a transaction, the court must still determine that the proposed transfer or obligation is justified in the case before it. The court reads this requirement as meaning that the court must make its own determination that the transaction will serve the interests of creditors and the debtor's estate.

In re Pilgrim's Pride Corp., 401 B.R. 229, 236–37 (Bankr. N.D. Tex. 2009) (citations omitted).

Other courts have evaluated KERPs based on factors set forth in *In re Dana Corp.*, 358 B.R. 567, 576-77 (Bankr. S.D.N.Y. 2006).

> Courts consider the following in determining if the structure of a compensation proposal and the process for developing the proposal meet the "sound business judgment" test:
>
> – Is there a reasonable relationship between the plan proposed and the results to be obtained, i.e., will the key employee stay for as long as it takes for the debtor to reorganize or market its assets, or, in the case of a performance incentive, *is the plan calculated to achieve the desired performance?* (emphasis added)
>
> – Is the cost of the plan reasonable in the context of the debtor's assets, liabilities and earning potential?
>
> – Is the scope of the plan fair and reasonable; does it apply to all employees; does it discriminate unfairly?
>
> – Is the plan or proposal consistent with industry standards?
>
> – What were the due diligence efforts of the debtor in investigating the need for a plan; analyzing which key employees need to be incentivized; what is available; what is generally applicable in a particular industry?
>
> – Did the debtor receive independent counsel in performing due diligence and in creating and authorizing the incentive compensation?

In re Dana Corp., 358 B.R. 567, 576–77 (Bankr. S.D.N.Y. 2006) (emphasis in original).

A critical assessment of the Plan, even according to these criteria, requires the conclusion that the Plan is not appropriate, and that the Motion should be denied.

First, there is no reasonable relationship between the Plan proposed and the results Debtors seek to obtain.

- Tier 1 participants, "made up of managers and above and non-union licensed operators," receive 100% of base salary, plus an additional $50,000 for *non-union* reactor operators. (Dkt. 400 at ¶30; Dkt. 404-2 at 10-11 (emphasis added)).
- Tier 2 participants, "made up of superintendents and supervisors," receive 80% of base salary. (Id.)
- Tier 3 participants, "nuclear engineers, nuclear specialists, and others," receive 60% of base salary. (Id.).

The proposed Plan is designed to provide extraordinary bonuses to management level employees only and is not tailored to Debtors' purported goal to keep its critical workforce intact until the proposed plant shutdown dates in 2020 and 2021.

While the KERP handsomely rewards management and supervisory personnel, Debtors admit that it covers only 44% of total employees, and those who are covered are only non-bargaining unit employees. (Dkt. 404-2 at 14). The KERP includes executives and management employees who do not even work at the plants. Although Tier 1 includes licensed operators, it is specifically limited to "*non-union* licensed operators." (Dkt. 404-2 at 10 (emphasis added)). None of the employees covered by the Local 29 Retention Plan nor the Local 245 Retention Plan, both of which end in 2018, are covered by the 2018 FENOC KERP. Further, none of FENOC's 899 represented employees receive a penny from the KERP. A Plan focused primarily on management employees ignores the operational side of running a nuclear power plant, and is

not reasonably related to Debtors' purported goal of keeping its workforce intact pending plant closure.[7]

Debtors admit there have been no Chapter 11 cases in which a nuclear power plant was deactivated. (Dkt. 404, ¶21 n. 14). Therefore, the comparable retention plans are those adopted in the context of the closure of a nuclear plant outside of bankruptcy. KERPs implemented in those cases apply to all employees. Debtors' consultant, after reviewing KERPs implemented at other nuclear plants which have announced shutdowns, found that "[g]enerally all employees are included." (Dkt. 404-2 at 14). Debtors have submitted no evidence of a nuclear plant closure where the KERP did not cover all employees.

One of the retention programs relied on by Debtors' consultants is the retention program for the Diablo Canyon nuclear power plant in California which is being decommissioned. (Dkt. 404-2 at 12). The California Public Utility Commission approved a retention plan that covered all employees to allow the plant to retain employees necessary for continued operations until closure. (Id.). The Commission, addressing the retention plan in the context of the public interest relating to the retirement of the plant, approved the retention plan in light of the "unique nature of the nuclear industry." *Application of Pac. Gas & Elec. Co. for Approval of the Ret. of Diablo Canyon Power Plant, Implementation of the Joint Proposal, & Recovery of Associated Costs*

[7] Debtors' purported justification for the 2018 FENOC KERP is inconsistent with the Local 29 Retention Plan and Local 245 Retention Plan, and the representations made by Debtors when seeking Court approval to make payments pursuant to those plans. With respect to the Local 29 Retention Plan, Debtor's Motion stated that "[t]he highly trained and qualified individuals needed for important positions in Debtors' nuclear power plants are in short supply and the nuclear industry's labor market is full of competitive opportunities," and that the Debtor has traditionally maintained special programs to retain such employees because they are "especially difficult to replace upon departure." (Dkt. 400, ¶¶18-20). With respect to the Local 245 Retention Plan, Debtor's Motion stated that after it was disclosed that the plants would be shut down, there was a "sudden increase in Represented Employee departures at the Davis-Besse Nuclear Power Station." (Id. ¶23). The 2018 FENOC KERP seeks to provide retention payments to employees of the same nuclear power plants that were covered by the Local 29 and 245 Retention Plans, but provides no retention payments to bargaining unit employees, despite the fact that the Debtors have previously admitted that the threats of plant closures have put the work force at risk of bargaining unit employees departing.

Through Proposed Ratemaking Mechanisms (U39e), 16-08-006, 2018 WL 555608, at *17 (Jan. 11, 2018).[8]

Debtors' materials also include the Pilgrim Nuclear Power Station in Plymouth, Massachusetts and the Indian Point Nuclear Power Plants in New York. (Dkt. 404-2 at 12). The Pilgrim plant is scheduled to close June 1, 2019 and the two units at Indian Point are scheduled to close in 2020 and 2021. (Id.). At Pilgrim, the company, Entergy Nuclear Operations, Inc., agreed to pay retention bonuses of as much as 100% of base salary "to each current Union employee" in order "to retain as many qualified Union employees as possible around and to the time and date when the shutdown and defueling of the Pilgrim Station reactor is projected to occur." (Memorandum of Agreement ¶6 (Pilgrim)). Likewise at Indian Point, the Company agreed to pay retention bonuses of as much as 100% of annual base pay "to each full-time regular bargaining unit employee" "[i]n an effort to retain as many qualified bargaining-unit employees as possible through the time and date when the shutdown and defueling of units 2 and 3 at IPEC are completed." (Memorandum of Agreement ¶3 (Indian Point)).[9]

Debtors did not provide the Court with the details of any of the other KERPs entered into in the context of recent nuclear plant shutdowns, but agreed that in such situations "generally all employees are included." (Dkt. 404-2 at 14). Accordingly, as demonstrated through these three examples, and Debtors' own evidence, a retention plan tailored to the goal of keeping the operational workforce intact should provide retention benefits to all employees.

Further, Debtors' plan to reward only certain employees undermines the claimed reasonableness of the Plan. As Debtors' own evidence establishes, a reasonable plan would apply

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[8] A copy of the decision is attached hereto as Exhibit B.

[9] The Memorandum of Agreement for Pilgrim is attached hereto as Exhibit C, and the Memorandum of Agreement for Indian Point is attached hereto as Exhibit D.

to the entire workforce. Debtors attempt to justify the Plan by reference to regulatory requirements. However, Debtors have identified only a few categories of employees, such as reactor operators, who are necessary to maintain compliance with applicable regulations, and have not identified how many reactor operators are required. No evidence is provided that regulations require the multiple levels of supervisors, superintendents, and managers included in the KERP. Further, it is not credible to contend that compliance with regulatory requirements will be jeopardized if a few mid-level management employees such as supervisors or superintendents leave FENOC, while at the same time Debtors leave most of the operational workforce at risk by providing no retention plan whatsoever for nearly 900 bargaining unit employees. Debtors' Plan is not tailored to the purported justification asserted for the Plan.

For example, in *In re Glob. Aviation Holdings Inc.*, 478 B.R. 142, 150 (Bankr. E.D.N.Y. 2012), the court approved retention payments totaling $137,031 to five employees because "[t]he KERP Employees fill the five positions specifically mandated by FAA regulation § 119.65, and oversee and manage the systems that must be approved by the FAA as a prerequisite to the relocation of North American's operations to Georgia." There is no evidence that the Plan in this case is narrowly tailored to the applicable regulations. Debtors, without sufficient evidentiary support, simply ask the Court to take their word that regulations require payments as great as 100% of salary to 1,019 FENOC employees.

Accordingly, the Plan does not bear a reasonable relationship to the goal of securing the workforce pending plant closure.

Second, the cost of the plan is not reasonable. As noted, the 2018 FENOC KERP has a cost of $99.7 million while previous retention plans approved by the Court have a cost of $23.9 million. What makes this cost unreasonable is the fact that the Plan addresses only 44% of the

workforce, and does not address the bulk of the employees who actually operate the plants. To date, as discussed above, the Debtors have attempted to strong-arm bargaining unit employees to continue to work at the plants by threatening violation of the CBA. While these tactics may be temporarily successful, Debtors will incur financial liabilities in the future when the consequences of such tactics, through grievances, arbitrations, and related claims, come home to roost. Addressing retention in an incomplete and piecemeal manner is inefficient and costly.

In evaluating the cost of the Plan, the comparable KERPs are those adopted in the context of other recent nuclear plant shutdowns. The data presented by the Debtors purports to demonstrate that KERPs adopted in nuclear plant shutdowns range from $28,289 to $70,769 "per Employee" (Dkt. 404-2 at 12 ("Average Annualized Retention/Severance per Employee")). However, as Debtors admit, and as the Diablo Canyon, Pilgrim, and Indian Point retention plans discussed above demonstrate, KERPs adopted in this context apply to *all employees*, not just management and supervisors.

The KERP in this case only provides retention incentives to 44% of the workforce, none of whom are bargaining unit employees who operate the plants. The Court cannot evaluate the cost of the Plan proposed by Debtors because it does not accomplish what the comparable KERPs accomplished in the context of a nuclear plant shutdown, *i.e.*, a retention plan for the entire workforce. Accordingly, the $29,000 to $70,000 range is a misleading number that is not relevant for evaluating the Plan in this case which does not cover all employees.

Even assuming that the $29,000 to $70,000 range identified by Debtors' consultant was relevant, Debtors' Motion should be rejected because the proposed KERP is near the top of the range of KERPs implemented in the context of nuclear plant closures. The calculations of Debtors' consultant indicate that the applicable average retention and severance for the proposed

Plan is $54,800. (Dkt. 404-2 at 14). This is much higher than the average annualized retention/severance per employee of the retention plans at Diablo Canyon, Pilgrim, and Indian Point, each of which provided retention for all employees.

Plant	Average Annualized Retention/Severance Per Employee
Diablo Canyon, California	$37,088
Indian Point 2 & 3, New York	$34,286
Pilgrim, Massachusetts	$48,000
FENOC	$54,800

(Id. at 12, 14). Accordingly, in light of the fact that the KERP only deals with the retention issue for 44% of FENOC employees and is at the high end of the range for even non-bankrupt nuclear shutdowns, the Plan should be rejected.

Third, the Plan is unfair and discriminatory because it was explicitly designed to exclude bargaining unit employees, focusing on management, supervisors, and superintendents, and even excluding the relatively small number of bargaining unit members covered by the Local 29 and Local 245 Retention Plans previously approved by the Court. The Debtors discriminate against the life blood of its workforce by compensating nearly all of its non-bargaining unit employees, while including no plan to retain the bargaining unit employees who run the plants. Under the Plan, 1,019 of 1,434 non-bargaining unit employees (71%) will receive bonuses of up to 100% of salary, and none of the 899 bargaining unit employees will receive any payment whatsoever. This severe disparity suggests that the design of the Plan is not for the purpose of retention, but strictly to discriminate against represented employees and reward management, particularly in light of the fact that Debtors' own consultant concluded that retention plans in this context apply to the entire workforce. Such discrimination is not "sound judgment."

Fourth, the Plan is not consistent with industry standards. As discussed above, Alvarez & Marsal North America, LLC, retained by the Debtors to assist in evaluating retention plans, reviewed retention plans for other nuclear plants which have announced a shutdown. A&M found that "[g]enerally all employees are included" in retention plans relating to shutdown of nuclear power plants. (Dkt. 404-2 at 14). The Debtors have presented no comparable plan that makes the kinds of distinctions among employees that they are proposing here. All such plans adopted in the context of a nuclear plant shutdown have included all employees in their retention plan. The Plan proposed by Debtors does not. Further, the Plan proposed by Debtors is well above industry standards. At $54,800 the Plan proposed by the Debtors is well above average ($29,000 to $70,000) in Plans proposed in the nuclear plant shutdown context. Accordingly, the Plan at issue is inconsistent with industry standards in both scope and cost.

Fifth, the Debtors did not exercise due diligence. No evidence is provided regarding how the Debtors decided that nearly 900 bargaining unit employees who report to work each day at these nuclear plants were not critical to the operation of the plants. Debtors repeatedly state that senior management made this determination, but no evidence is provided to the Court regarding what criteria were applied and why bargaining unit employees did not meet these criteria. This is particularly significant in light of the fact that, according to Debtors' consultant, every other operator which shut down a nuclear plant in recent years determined that retention plans for bargaining unit employees were necessary and generally extended such plans to the entire workforce.

Finally, the Unions were frozen out of any discussion regarding the design of the Plan. Debtors did not discuss, much less bargain, with any of the Unions regarding the 2018 FENOC KERP. In *In re Geneva Steel Company*, 236 B.R. 770 (D. Utah 1999), the Court denied the

company's motion to approve a KERP despite the company's assertion that the KERP reflected sound business judgment, and despite the fact that the motion was supported by the Unsecured Creditors Committee and the Official Committee of Bondholders. The Court denied the motion, finding that "to propose this retention program without first having discussed its provisions with the Steelworkers is not an example of sound business judgment." *Id*. at 773. The Court found that some employees had already left the company and that the unions' participation was as important as that of the key employees. The Court found that "[i]f Geneva's management had consulted with the Steelworkers while formulating its retention program, the resulting program might have accommodated the Steelworkers' objections, might have been submitted to the court unopposed, and might have been approved by the court as filed." *Id*. at 773 n. 4.

The Unions, on behalf of their members, are a key stakeholder in this matter. The Debtors' complete failure to consult with the Unions regarding a proposal to spend over $100 million for employee benefits that excludes all Union members sends a very loud message that is counter-productive to the stated purposes of employee retention and maintenance of employee morale.

CONCLUSION

The Court should approach the issue of retention in a holistic manner, consistent with the manner in which retention has been dealt with by other operators faced with retaining their workforce while facing the planned closure of a nuclear power plant. Until Debtors deal with the issue of retention of bargaining unit employees, neither the Debtors, nor the Court can know the true cost of retention. Piecemeal adoption of a retention plan for only 44% of the workforce, when the industry standard is to implement a retention plan for the entire workforce, is not justified by the facts and circumstances, nor is it even an exercise of sound business judgment.

For the foregoing reasons, the Unions request that the Court deny Debtors' Motion authorizing payments pursuant to the 2018 FENOC KERP.

Dated: June 8, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2018, a true and correct copy of the foregoing was filed electronically and was served as follows:

Via the court's Electronic Case Filing System on these entitles and individuals who are listed on the court's Electronic Mail Notice List:

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The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

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